

MAR 30 1995

STATE OF ARIZONA

DEPARTMENT OF INSURANCE

DEPARTMENT OF INSURANCE
By Alc

In the Matter of)	Docket No. 8652
)	
DEPENDABLE MESSENGER, INC.,)	ORDER
)	
Petitioner.)	
_____)	

On February 28, 1995, a hearing took place in the above-referenced matter. Neil Pritt, the President of Petitioner Dependable Messenger, Inc. ("Dependable"), appeared on behalf of Dependable. John P. Flynn appeared on behalf of the National Council on Compensation Insurance ("NCCI"). Assistant Attorney General Peter H. Schelstraete appeared on behalf of the Arizona Department of Insurance ("Department").

Based upon the entire record in this matter, including all pleadings, motions, testimony, and exhibits admitted during the hearing of this matter, Administrative Law Judge Gregory Y. Harris has prepared the following Findings of Fact, Conclusions of Law, and Order for consideration and approval by the Director of the Arizona Department of Insurance (the "Director"). The Director adopts and enters the following Findings of Fact, Conclusions of Law and enters the following Order:

FINDINGS OF FACT

I. Background

1. Dependable, an Arizona corporation, does business in Arizona.
2. Dependable initiated this proceeding under A.R.S. §20-367 to challenge the classification decision made by its workers compensation insurer, the Arizona State Compensation Fund

1 (the "State Fund"). Dependable had the burden to prove its
2 entitlement to the relief sought in its hearing request.

3 3. The NCCI holds a license in Arizona as a workers
4 compensation rating organization. Under Arizona's laws relating
5 to the establishment of workers compensation rates, insurers
6 which sell workers compensation insurance in Arizona must belong
7 to a rating organization and follow the rating system filed by
8 that rating organization when classifying risks.

9 4. The State Fund subscribes to the uniform payroll
10 rating and classification system filed with the Department by the
11 NCCI. The Department has approved this rating system, including
12 the portion of the rating system at issue in this proceeding.

13 5. Dependable pays workers compensation insurance
14 premiums based upon a percentage of its payroll. The State Fund
15 uses the NCCI's rating and classification system to calculate
16 Dependable's workers compensation insurance premium.

17 6. The terms of the NCCI's rating system filed with
18 and approved by this Department are published in the NCCI's
19 Basic Manual for Workers Compensation and Employers Liability
20 Insurance (the "Basic Manual"). The Scopes of Basic Manual
21 Classifications (the "Scopes Manual"), which the NCCI also
22 publishes, contains detailed descriptions of the classification
23 codes.

24 7. According to the Basic Manual, "[t]he object of
25 the classification procedure is to assign the one basic
26 classification which best describes the business of the employer
27 within a state." The Basic Manual further states that "[i]t is
28

1 the business which is classified, and not the individual
2 employments, occupations or operations within a business."

3 8. The Basic Manual further provides that within
4 narrowly tailored limits, if a business operates multiple
5 business operations, more than one classification code may be
6 applied to these operations. Basic Manual Rule IV(D). At no
7 time relevant to this proceeding has Dependable's operations
8 fallen within these limits.

9 9. Dependable's primary business consists of the
10 operation of a delivery service. Dependable has one office in
11 Phoenix and another in Tucson. Through this business, Dependable
12 picks up and delivers envelopes and packages pursuant to its
13 customers' directions. The envelopes and packages generally
14 weigh between a few ounces and 25 pounds. Dependable also
15 operates an employee leasing program.

16 10. In 1994, the State Fund applied the delivery
17 service classification code 7231 to calculate Dependable's
18 workers compensation insurance premium. The State Fund applied
19 this classification code to all portions of Dependable's payroll
20 except the clerical workers.

21 11. On October 14, 1994, Dependable filed a request
22 with the NCCI to challenge the assignment of classification code
23 7231 to all of the non-clerical payroll generated by its
24 employees to calculate Dependable's workers compensation
25 insurance premium.

26 12. On November 16, 1994, the NCCI convened the
27 Arizona Classification and Review Panel (the "Panel") to consider
28 Dependable's challenge.

1 13. The Panel considered and rejected Dependable's
2 challenge. On November 23, 1994, the NCCI sent a copy of the
3 Panel's decision to Dependable, and advised Dependable that the
4 rating classification would not be changed.

5 14. On December 7, 1994, the Director received
6 Dependable's timely request for hearing pursuant to A.R.S.
7 §20-367. In the request, Dependable disputed the conclusion that
8 its entire non-clerical payroll fell within the scope of
9 classification code 7231.

10 II. Statement of the Issues

11 15. The central question to be resolved in this matter
12 concerns whether a portion of Dependable's non-clerical payroll
13 should have been assigned to a classification other than 7231.

14 16. The Basic Manual describes businesses that
15 classification code 7231 covers in the following way:

16 TRUCKING: MAIL, PARCEL OR PACKAGE DELIVERY--ALL
17 EMPLOYEES & DRIVERS, Applies to risks engaged
18 exclusively under contract in local delivery of
19 mail, parcels or packages limited to 100 lb. or
20 less and may be used only upon specific
21 assignment of the rating organization having
22 jurisdiction.

23 17. The Scopes Manual further describes businesses
24 falling within the classification code 7231 with the following
25 additional information:

26 SCOPE Code 7231 is intended to apply to those
27 insureds who, under contract with private
28 enterprises, provide a pickup and delivery
 service for mail consisting of small parcels or
 packages in addition to envelopes. These items
 are usually picked up at post offices and
 delivered to the customer's location; however,
 these insureds also pick up mail or parcels
 from their customers and deliver to locations
 specified by the customer, performing a local
 delivery service comparable to that provided by

1 U.S. Postal Service. Refer to Code 7232 for
2 risks engaged in mail, parcel or package
3 delivery under contract to the U.S. Postal
4 Service.

5 Although in most instances, private
6 passenger automobiles, station wagons, sedan
7 deliveries, vans and pickup trucks will be
8 utilized, there is no specific restriction to
9 the type of motor vehicle used for the delivery
10 operations.

11 As shown in the footnote to this
12 classification, Code 7231 applies to risks
13 engaged exclusively under contract in local
14 delivery of mail, parcels or packages limited
15 to 100 lb. or less.

16 Mail, parcels or packages, as shown in the
17 classification phraseology, refers to those
18 items where the delivery tariff or charge is
19 allocable to the individual envelope, parcel or
20 package.

21 This classification would not be applicable
22 to truckers hauling packaged goods or
23 merchandise where the haulage or transport
24 charge is based on a truckload or partial
25 truckload, the cumulative weight of the
26 packages and/or parcels being transported or a
27 flat price for the consignment.

28 The term "Local" intended to limit the
radius of operations to that which would permit
a driver to complete the assigned deliveries
and return to the point of dispatch within the
normal workday.

This classification also includes mechanics
and garage employees who maintain, service or
repair the equipment.

19 III. Dependable's Arguments

20 18. Dependable raises three arguments against the
21 assignment of classification 7231 to its business:

22 a) Its delivery service business encounters
23 substantially different risks than the risks encountered by
24 traditional trucking businesses.

25 b) The delivery services that it performs match the
26 risks faced by other businesses assigned to different
27 classification codes, the employees of which perform identical
28 services. Yet, Dependable's performance of these services

1 results in the assignment of a classification code with a
2 substantially higher premium than that applied to these other
3 businesses.

4 c) Its operation of an employee leasing program
5 should result in the application of the "special employer's"
6 classification code to the payroll generated through the leasing
7 of employees.

8
9 A. The NCCI Properly Applied Classification Code 7231 to
Dependable's Service Business

10 19. Dependable's delivery service operation involves
11 the delivery of mail, parcels or packages that weigh 100 pounds
12 or less.

13 20. Dependable contends that the packages it delivers
14 weigh ounces or a few pounds, and almost never more than 25
15 pounds. Dependable suggests that the relatively low weights
16 transported by its employees subject its workers to far less risk
17 of injury when compared to the risks faced by delivery businesses
18 that handle packages that routinely weigh close to 100 pounds or
19 more. Therefore, Dependable urges that it should be classified
20 separately from businesses that handle heavier packages.

21 21. The delivery service that Dependable performs
22 falls within classification code 7231. That Dependable generally
23 carries packages that weigh less than the maximum weight for this
24 classification has no relevance to the determination of the
25 proper classification code.

26 22. Therefore, Dependable has failed to establish that
27 the NCCI erroneously applied classification code 7231 to
28 Dependable's delivery service operation.

1
2 B. The Overall Business, and Not Individual Employments
3 Determines the Applicable Classification Code

4 23. Dependable argues that the classification codes
5 applicable to banks and law firms, which include the performance
6 of delivery functions as examples of the types of employments
7 subject to these codes, should be applied to its delivery service
8 business. Basic Manual Classification Codes 8742 and 8810.

9 Dependable makes this argument because its employees and the
10 employees of a bank or law firm who perform delivery functions
11 face essentially the same risks when performing these functions.

12 24. The principal business of banks and law firms does
13 not consist of performing deliveries. Although employees of
14 these businesses may perform delivery functions, the performance
15 of these acts does not transform these businesses into delivery
16 businesses. Instead, the NCCI's rating system accounts for the
17 performance of these services as a component of the overall
18 operation of a business in the development of both the
19 classifications and the premium for these distinguishable
20 business operations.

21 25. As noted above, the classification system focuses
22 upon the overall business, and the cumulative impact of the risks
23 associated with the business to determine both the classification
24 code and the applicable premium. This principle applies with
25 equal force to the classification of Dependable's delivery
26 business. With the focus on the business and not the separate
27 employments, the facts support the conclusion of the
28 applicability of classification code 7231 to Dependable.

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2 C. Dependable's Employee Leasing Program Falls Within the Lent
3 Employee Doctrine

4 26. Arizona law recognizes the concept of the lent
5 employee for purposes of workers compensation law. Word v.
6 Motorola, Inc., 135 Ariz. 517, 662 P.2d 1024 (1983).

7 27. The Lent Employee doctrine addresses situations in
8 which two or more employers become responsible for an employee's
9 compensation coverage and any industrial injuries suffered by the
10 employee. This situation arises when an employer (the "General
11 Employer") has assigned an employee to work for a "Special
12 Employer." As explained by the Arizona Supreme Court:

13 When a general employer lends an employee to
14 a special employer, the special employer
15 becomes liable for workmen's compensation only
16 if:

17 a) the employee has made a contract of hire,
18 express or implied, with the special employer;

19 b) the work being done is essentially that
20 of the special employer; and

21 c) the special employer has the right to
22 control the details of the work.

23 When all three of the above conditions are
24 satisfied in relation to both employers, both
25 employers are liable for workmen's compensation.

26 Word, 135 Ariz. at 520, 662 P.2d at 1027 (quoting A. Larson
27 Workmen's Compensation Law § 48.00).

28 28. For the past several years, Dependable lent a
portion of its employees to other businesses. Employees lent by
Dependable perform delivery services for the companies that hire
Dependable. Currently, Dependable has contracts with several
other employers involving approximately 10 employees lent by
Dependable to these other employers. These employees generate

1 approximately 33% of Dependable's revenues and represent a
2 significant portion of Dependable's payroll expenses.

3 29. Dependable introduced into evidence a contract
4 entered into with Lutheran Healthcare Network (the "Network").
5 This contract obligates Dependable to lend the Network employees
6 who work exclusively for the Network. This work involves the
7 execution of the Network's delivery requirements relating to the
8 two hospitals it operates in Mesa, Arizona.

9 30. Dependable has similar employee leasing
10 arrangements with other businesses, including Phoenix Memorial
11 Hospital, St. Joseph's Hospital, General Medical Corp., Baxter
12 Pharmaceuticals, Evans-Wythecombe, and Maricopa County.
13 Dependable's representatives offered uncontroverted testimony
14 that these other businesses receive services consistent with
15 those supplied to the Network by Dependable.

16 31. Dependable's agreement with the Network
17 constitutes an agreement that falls within the scope of the Lent
18 Employee doctrine. Work performed by the lent employees
19 constitutes work performed by the employee under a contract for
20 hire with the Network, the special employer. This conclusion
21 stems from the lent employees' acceptance of the Dependable's
22 assignment to work, and the acceptance of this assignment subject
23 to the control, direction and supervision of the special
24 employer. Avila v. Northrup King Company, ___ Ariz. ___, 880
25 P.2d 717, 722-724 (App. 1994).

26 32. The Network had the right to control the details
27 and controlled the details of the work performed by employees
28 lent by Dependable. The employees lent by Dependable report to

1 work at the Network and receive direction and supervision from a
2 Network employee. The deliveries performed are performed in vans
3 supplied and maintained by the Network, and which bear only the
4 mark of the Network. The Network supplies a report to Dependable
5 of the work performed under the contract and pays Dependable for
6 the value of the services provided. Dependable issues the
7 paychecks earned by the workers lent to the Network. The Network
8 instructs the employees in the routes to follow and where items
9 are to be delivered. The Network has the right to terminate an
10 employee lent by Dependable. Further, the delivery represents a
11 regular part of the Network's operation of a health care facility
12 in central Mesa and another in east Mesa.

13 33. The employees lent by Dependable perform the
14 Network's work. Dependable did not supply a supervisor to
15 oversee the work to be performed for the Network. Instead, the
16 Network assumed responsibility of direct oversight of the workers
17 lent by Dependable. The lent employees in turn respond to
18 direction from the Network regarding the deliveries to be made
19 and the manner of the performance of these duties, all of which
20 relate only to the business of the Network.

21 34. Dependable has agreed to indemnify the Network for
22 claims arising from the services provided by Dependable under the
23 agreement. The agreement makes no reference to compensation
24 coverage. Dependable has paid the premium for this coverage for
25 the employees lent to the Network.

26 35. Dependable's entry into an indemnification
27 agreement with the Network does not undermine the conclusion that
28 the agreement of these parties falls within the scope of the Lent

1 Employee doctrine. The indemnification clause did not convert
2 the arrangement into something other than a leased employee
3 contract. Instead, this provision allocated legal rights and
4 responsibilities between general and special employers, an
5 allocation that has no impact on the applicability of the
6 doctrine. Avila, 880 P.2d at 724; Kirkland v. Western Electric
7 Company, Inc., 296 So.2d 350, 354-355 (La. App. 1974).

8 36. The NCCI did not apply the Lent Employee doctrine
9 to the portion of the payroll attributable to Dependable's
10 employee leasing program. The NCCI did not apply this doctrine
11 because it concluded that Dependable's operation of a delivery
12 service as its primary business precluded consideration of an
13 employee leasing program in the same field. NCCI gave two
14 reasons for this position. First, the NCCI concluded that the
15 employee leasing program could not be considered to be a separate
16 business operation. Second, the NCCI raised concerns about
17 "premium leakage."

18 37. Rule IV(D) of the Basic Manual allows multiple
19 classifications to be applied to a single business if the
20 business conducts separate business operations. This factor has
21 no applicability to the Lent Employee doctrine. As discussed
22 above, for the doctrine to be invoked, lent employees cannot be
23 subject to the general employer's control. A separate business
24 operation meeting the test established by Rule IV(D) necessarily
25 constitutes an operation subject to the control of the general
26 employer. Thus, when employment falls within the Lent Employee
27 doctrine, the employees should be considered as part of the
28

1 special employer's business rather than the general employer's
2 business.

3 38. No authority has been cited to support the
4 proposition that for Dependable's employee leasing program to
5 fall within the doctrine, the program must involve services
6 distinguishable from its delivery service operation. Instead,
7 the nature of Dependable's preliminary business and the services
8 performed by the employees lent to special employers has no
9 relevance to the doctrine's applicability. Avila, 880 P.2d at
10 725.

11 39. No evidence exists in the record to support the
12 concerns voiced by the NCCI regarding "premium leakage." As
13 described at the hearing, premium leakage would arise, at least
14 in part, from the interchange of labor between Dependable's
15 normal delivery service and the work performed under the employee
16 leasing program. However, no interchange of labor occurs between
17 Dependable's employee leasing program and the delivery business
18 it controls. Further, the parties presented no evidence of the
19 occurrence of premium leakage.

20 40. The NCCI took no further steps to consider the
21 applicability of the Lent Employee doctrine to Dependable's
22 operation after determining the inapplicability of the doctrine
23 to the portion of Dependable's payroll attributable from its
24 employee leasing program. The NCCI should have undertaken
25 further analysis. Both the record and the applicable law
26 demonstrate the doctrine's applicability to Dependable's employee
27 leasing program.

1 41. The NCCI's classification system requires the
2 classification of the business as a whole rather than the
3 individual employments. The Lent Employee doctrine dictates that
4 for workers compensation coverage purposes, a lent employee is an
5 employee of the special employer rather than the general
6 employer. Taken together, these two concepts require the
7 application of the special employer's classification code to
8 calculate the workers compensation insurance premium for a lent
9 employee.

10 42. Neither the Basic Manual nor the Scopes Manual
11 directly address the Lent Employee doctrine. However, the
12 application of the Special Employer's code classification to the
13 lent employee's pay comports with the purpose of the
14 classification system, the risk spreading mechanism of the
15 compensation system, and the rationale for the Lent Employee
16 doctrine. When an employee's work has been leased and made
17 subject to the special employer's control and operating
18 methodology, were a classification other than the special
19 employer's assigned to the leased employee's payroll, the
20 resulting classification would be based upon an individual
21 employment rather than the overall risk posed by the special
22 employer's business operation.

23 43. Dependable has demonstrated that the arrangement
24 it entered into with the Network falls within the Lent Employee
25 doctrine. Dependable also presented evidence that its employee
26 leasing contracts with the businesses identified above in ¶30
27 also fall within the doctrine. The NCCI did not refute this
28 doctrine's applicability to Dependable's other contracts. These

1 other businesses constitute the special employers of the
2 employees lent by Dependable. Thus, the Lent Employee doctrine
3 should have been applied by the NCCI to Dependable's employee
4 leasing program.

5 44. Neither party presented evidence concerning the
6 classification codes assigned to the special employers who have
7 been lent employees by Dependable. Thus, in reaching the
8 conclusion that the Lent Employee doctrine applies to
9 Dependable's employee leasing program, no conclusions can be
10 reached regarding the appropriate code to be applied. Instead,
11 the record supports only the conclusion that the NCCI erred by
12 applying Dependable's classification code to Dependable's entire
13 non-clerical payroll. The NCCI should have applied the
14 classification code of the special employer to the employees lent
15 by Dependable to the special employer.

16 45. The evidence presented by the parties did not
17 identify the precise portion of Dependable's payroll attributable
18 to the operation of an employee leasing program. When the NCCI
19 applies the Lent Employee doctrine to identify the applicable
20 classification codes to calculate Dependable's premium, an audit
21 or other steps may be taken to identify this payroll breakdown.


22 CONCLUSIONS OF LAW

23 1. Dependable Messenger, Inc. and the National
24 Council on Compensation Insurance received notice of this
25 proceeding as prescribed by A.R.S. §§20-163 and 41-1061.

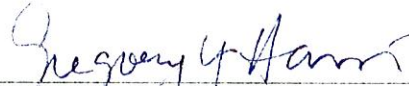
26 2. The Director has jurisdiction over this matter
27 pursuant to A.R.S. §§20-142 and 20-367.
28

1 classification code to calculate the workers compensation
2 insurance premium.

3 EFFECTIVE this 30th day of March, 1995.

4
5 

6 CHRIS HERSTAM
7 Director of Insurance

8 

9 GREGORY Y. HARRIS
10 Chief Administrative Law Judge

11 NOTIFICATION OF RIGHTS

12 The aggrieved party may request a rehearing with
13 respect to this Order by filing a written petition with the
14 Administrative Law Division within 30 days of the date of this
15 Order, setting forth the basis for such relief pursuant to A.A.C.
16 R4-14-114(B).

17 The final decision of the Director may be appealed to
18 the Superior Court of Maricopa County for judicial review
19 pursuant to A.R.S. §20-166.

20
21 COPY of the foregoing mailed/delivered
this 30th day of March, 1995, to:

22 Gay Ann Williams, Deputy Director
23 Charles R. Cohen, Executive Assistant Director
24 Deloris E. Williamson, Assistant Director
25 Bernard Hill, Property and Casualty Analyst
Department of Insurance
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Phoenix, Arizona 85018

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